



DEPARTMENT OF HEALTH AND HUMAN SERVICES

OFFICE OF INSPECTOR GENERAL

WASHINGTON, DC 20201



[We redact certain identifying information and certain potentially privileged, confidential, or proprietary information, unless otherwise approved by the requestor(s).]

Issued: March 4, 2026

Posted: March 9, 2026

[Address block redacted]

Re: OIG Advisory Opinion No. 26-04 (Favorable)

Dear [redacted]:

The Office of Inspector General (“OIG”) is writing in response to your request for an advisory opinion on behalf of [redacted] (“Requestor”), regarding the transfer of certain ownership interests by Requestor’s sole shareholder in anticipation of his retirement from the practice of medicine (the “Proposed Arrangement”). Specifically, you have inquired whether the Proposed Arrangement, if undertaken, would constitute grounds for the imposition of sanctions under the exclusion authority at section 1128(b)(7) of the Social Security Act (the “Act”) or the civil monetary penalty provision at section 1128A(a)(7) of the Act, as those sections relate to the commission of acts described in section 1128B(b) of the Act (the “Federal anti-kickback statute”).

Requestor has certified that all of the information provided in the request, including all supplemental submissions, is true and correct and constitutes a complete description of the relevant facts and agreements among the parties in connection with the Proposed Arrangement, and we have relied solely on the facts and information Requestor provided. We have not undertaken an independent investigation of the certified facts and information presented to us by Requestor. This opinion is limited to the relevant facts presented to us by Requestor in connection with the Proposed Arrangement. If material facts have not been disclosed, have been misrepresented, or change, then this opinion is without force and effect.

Based on the relevant facts certified in your request for an advisory opinion and supplemental submissions, we conclude that, although the Proposed Arrangement, if undertaken, would generate—if the requisite intent were present—prohibited remuneration under the Federal anti-kickback statute, OIG would not impose administrative sanctions on Requestor in connection with the Proposed Arrangement under sections 1128A(a)(7) or 1128(b)(7) of the Act, as those sections relate to the commission of acts described in the Federal anti-kickback statute.

This opinion may not be relied on by any person¹ other than Requestor and is further qualified as set out in Part IV below and in 42 C.F.R. Part 1008.

I. FACTUAL BACKGROUND

Requestor is a California corporation that operates as a Medicare-certified ambulatory surgical center (“ASC”). [redacted] (“Physician A”), is Requestor’s sole shareholder. Physician A and his two children—[redacted] (“Physician B”), and [redacted] (“Physician C”)—are engaged in the same medical practice specialty of pain management and provide pain management services to patients, including Federal health care program enrollees (Physician A, Physician B, and Physician C are collectively referred to as the “Physicians”). Physician A is married to [redacted], who is not a physician or other type of clinician (the “Non-Physician Investor”).² Under the Proposed Arrangement, the Non-Physician Investor would not be employed by Requestor and would not furnish any services to Requestor, including, but not limited to, marketing or administrative services. Requestor certified that the Non-Physician Investor is not in a position to make or influence referrals to Requestor or to any of the Physicians.³ Requestor certified that the Proposed Arrangement is a bona fide estate planning strategy and that it maintains documents (e.g., trust documents, family business plans) to illustrate the long-term succession plan of Physician A and the Non-Physician Investor, parents of Physician B and Physician C.

Under the Proposed Arrangement, there are three phases. Each phase of the Proposed Arrangement involves the distribution of: (i) ownership interests in Requestor to one or more individuals; and (ii) financial distributions in the form of a return on investment to those individuals.

The first phase will be triggered by the completion of a valuation of Requestor’s shares by a valuation consulting firm Requestor has engaged for that purpose. During the first phase of the Proposed Arrangement, Physician A would apportion the 1,000 shares in Requestor (900 of which are Class A shares and 100 of which are Class B shares) as follows: (i) gift 290 Class A shares to the Non-Physician Investor at no cost to her; (ii) provide the option to purchase up to

¹ We use “person” herein to include persons, as referenced in the Federal anti-kickback statute, as well as individuals and entities, as referenced in the exclusion authority at section 1128(b)(7) of the Act.

² Requestor certified that the Non-Physician Investor is not employed in a profession related to health care.

³ This certification is consistent with commentary in preamble to OIG’s 1999 safe harbor rulemaking. There, OIG stated that “there is minimal risk that a payment made to such a non-referral source investor would implicate the anti-kickback statute, and accordingly investments by such investors do not taint the ASC investment.” We further noted, however, that certain categories of employees—such as marketing or administrative personnel—may be referral sources. See OIG, Medicare and State Health Care Programs: Fraud and Abuse; Clarification of the Initial OIG Safe Harbor Provisions and Establishment of Additional Safe Harbor Provisions Under the Anti-Kickback Statute; Final Rule, 64 Fed. Reg. 63,518, 63,537 (Nov. 19, 1999).

50 Class A shares to each of Physician B and Physician C, which Physician B and Physician C would purchase at fair market value; (iii) retain between 510 and 610 Class A shares (depending on how many Class A shares Physician B and Physician C elect to purchase, pursuant to (ii)); and (iv) retain 100 Class B shares for potential future investment by other physicians (“Future Physician Investors”).

The second phase of the Proposed Arrangement would commence if and when the Board votes to issue Class B shares to Future Physician Investors.⁴ Requestor’s Board—in its sole discretion—would determine whether to offer the Class B shares for purchase, and, if the shares are offered, the number of shares to be offered. During this phase of the Proposed Arrangement, Requestor would offer up to 100 Class B shares to Future Physician Investors, who could be engaged in the medical practice specialty of pain management or another medical practice specialty; Future Physician Investors would purchase the Class B shares at fair market value.⁵ In addition, Requestor certified that, during the second phase of the Proposed Arrangement, Physician A would retire from the practice of medicine. Requestor certified that, upon retirement, Physician A would provide a written certification that he would not directly or indirectly influence referrals to Requestor; the written certification is reinforced by Requestor’s certification that Physician A does not intend to formally transition or assign his patient panel to Physician B or Physician C. Rather, Physician A plans to gradually transition out of active clinical practice over a number of years. To the extent that he recommends patients seek care from another pain specialist physician as he transitions out of active clinical practice, Physician A will not recommend a specific physician and instead would provide a list of alternative, local pain specialist physicians that could include, but would not be limited to, Physician B and Physician C. Requestor further certified that Physician A would not maintain an administrative or governance role with Requestor upon retirement.

The third phase of the Proposed Arrangement would commence upon the deaths of both Physician A and the Non-Physician Investor. Following the deaths of Physician A and the Non-Physician Investor, their respective ownership interests would transfer as a gift (*i.e.*, without any payment for such interests) to Physician B and Physician C.

At all times during the Proposed Arrangement, Requestor certified that:

- The investment entity would be a Medicare-certified ASC, whose operating and recovery room space is dedicated exclusively to the ASC.
- Patients referred to Requestor by an investor would be fully informed of the investor’s investment interest.

⁴ If Requestor’s Board of Directors does not vote to issue Class B shares, the Proposed Arrangement will include only Phase 1 and Phase 3.

⁵ The ASC may become a multi-specialty ASC during this phase of the Proposed Arrangement, depending on the medical practice specialty of the Future Physician Investors.

- The terms on which an investment interest would be offered to an investor would not be related to the previous or expected volume of referrals, services furnished, or the amount of business otherwise generated from that investor to the entity.
- At least one-third of each physician investor's medical practice income from all sources for the previous fiscal year or previous 12-month period would be derived from the physician's performance of procedures.
- The entity or any investor (or other individual or entity acting on behalf of the entity or any investor) would not loan funds to or guarantee a loan for an investor if the investor uses any part of such loan to obtain the investment interest.
- The amount of payment to an investor in return for the investment would be directly proportional to the amount of the capital investment (including the fair market value of any pre-operational services rendered) of that investor.
- All ancillary services for Federal health care program beneficiaries performed at the entity would be directly and integrally related to primary procedures performed at the entity, and none would be separately billed to Medicare or other Federal health care programs.
- The entity and any physician investors would treat patients receiving medical benefits or assistance under any Federal health care program in a nondiscriminatory manner.

In addition to certifying that the foregoing conditions would be met, Requestor certified that, during the second and third phases of the Proposed Arrangement, at least one-third of the procedures performed by each physician investor for the previous fiscal year or previous 12-month period would be performed at Requestor's facility.

Requestor further certified that, during the first phase of the Proposed Arrangement, all of the investors would be: (i) physicians engaged in the same medical practice specialty (i.e., pain management) who are in a position to refer patients directly to Requestor and perform procedures on such referred patients (i.e., Physician A, Physician B, and Physician C); or (ii) investors who are not employed by Requestor or by any investor, are not in a position to provide items or services to Requestor or any of its investors, and are not in a position to make or influence referrals directly or indirectly to Requestor or any of its investors (i.e., the Non-Physician Investor).

During the second and third phases of the Proposed Arrangement, Requestor certified that all of the investors would be: (i) physicians who are in a position to refer patients directly to Requestor and perform procedures on such referred patients (i.e., Physician A (until his retirement during the second phase of the Proposed Arrangement), Physician B, Physician C, and Future Physician Investors); or (ii) investors who are not employed by Requestor or by any investor, are not in a position to provide items or services to Requestor or any of its investors, and are not in a position to make or influence referrals directly or indirectly to Requestor or any of its investors (i.e., the Non-Physician Investor, and, upon retirement during the second phase of the Proposed Arrangement, Physician A).

II. LEGAL ANALYSIS

A. Law

The Federal anti-kickback statute makes it a criminal offense to knowingly and willfully offer, pay, solicit, or receive any remuneration to induce, or in return for, the referral of an individual to a person for the furnishing of, or arranging for the furnishing of, any item or service reimbursable under a Federal health care program.⁶ The statute's prohibition also extends to remuneration to induce, or in return for, the purchasing, leasing, or ordering of, or arranging for or recommending the purchasing, leasing, or ordering of, any good, facility, service, or item reimbursable by a Federal health care program.⁷ For purposes of the Federal anti-kickback statute, "remuneration" includes the transfer of anything of value, directly or indirectly, overtly or covertly, in cash or in kind.

The statute has been interpreted to cover any arrangement where one purpose of the remuneration is to induce referrals for items or services reimbursable by a Federal health care program.⁸ Violation of the statute constitutes a felony punishable by a maximum fine of \$100,000, imprisonment up to 10 years, or both. Conviction also will lead to exclusion from Federal health care programs, including Medicare and Medicaid. When a person commits an act described in section 1128B(b) of the Act, OIG may initiate administrative proceedings to impose civil monetary penalties on such person under section 1128A(a)(7) of the Act. OIG also may initiate administrative proceedings to exclude such person from Federal health care programs under section 1128(b)(7) of the Act.

Congress has developed several statutory exceptions to the Federal anti-kickback statute.⁹ In addition, the U.S. Department of Health and Human Services has promulgated safe harbor regulations that specify certain practices that are not treated as an offense under the Federal anti-kickback statute and do not serve as the basis for an exclusion.¹⁰ However, safe harbor protection is afforded only to those arrangements that precisely meet all of the conditions set forth in the safe harbor. Compliance with a safe harbor is voluntary. Arrangements that do not comply with a safe harbor are evaluated on a case-by-case basis. The safe harbor for single-specialty (i.e., during the first phase of the Proposed Arrangement)¹¹ and multi-specialty (i.e.,

⁶ Section 1128B(b) of the Act.

⁷ Id.

⁸ E.g., United States v. Nagelvoort, 856 F.3d 1117 (7th Cir. 2017); United States v. McClatchey, 217 F.3d 823 (10th Cir. 2000); United States v. Davis, 132 F.3d 1092 (5th Cir. 1998); United States v. Kats, 871 F.2d 105 (9th Cir. 1989); United States v. Greber, 760 F.2d 68 (3d Cir. 1985).

⁹ Section 1128B(b)(3) of the Act.

¹⁰ 42 C.F.R. § 1001.952.

¹¹ 42 C.F.R. § 1001.952(r)(2).

during the second and third phase of the Proposed Arrangement)¹² ASCs is potentially applicable to the Proposed Arrangement. The safe harbor protects financial distributions paid on investments in single-specialty and multi-specialty ASCs.

The single-specialty ambulatory surgical centers safe harbor would protect financial distributions to the Physicians and the Non-Physician Investor if all of the following six conditions of the safe harbor are met:

- (i) The terms on which an investment interest is offered to an investor must not be related to the previous or expected volume of referrals, services furnished, or the amount of business otherwise generated from that investor to the entity.
- (ii) At least one-third of each physician investor's medical practice income from all sources for the previous fiscal year or previous 12-month period must be derived from the surgeon's performance of procedures.¹³
- (iii) The entity or any investor (or other individual or entity acting on behalf of the entity or any investor) must not loan funds to or guarantee a loan for an investor if the investor uses any part of such loan to obtain the investment interest.
- (iv) The amount of payment to an investor in return for the investment must be directly proportional to the amount of the capital investment (including the fair market value of any pre-operational services rendered) of that investor.
- (v) All ancillary services for Federal health care program beneficiaries performed at the entity must be directly and integrally related to primary procedures performed at the entity, and none may be separately billed to Medicare or other Federal health care programs.
- (vi) The entity and any physician investors must treat patients receiving medical benefits or assistance under any Federal health care program in a nondiscriminatory manner.

For the purpose of the single-specialty ASC safe harbor, all of the investors must be:

- (i) physicians engaged in the same medical practice specialty who are in a position to refer patients directly to Requestor and perform procedures on such referred patients; or (ii) investors who are not employed by Requestor or by any investor, are not in a position to provide items or services to Requestor or any of its investors, and are not in a position to make or influence referrals directly or indirectly to Requestor or any of its investors.

The multi-specialty ambulatory surgical centers safe harbor includes all the same elements as the single-specialty ASC safe harbor, plus it also requires that at least one-third of the procedures performed by each physician investor for the previous fiscal year or previous 12-month period must be performed at the investment entity. In addition, all of the investors must be:

¹² 42 C.F.R. § 1001.952(r)(3).

¹³ "Procedures" means any procedure or procedures on the list of Medicare-covered procedures for ambulatory surgical centers in accordance with regulations issued by the Department.

(i) physicians who are in a position to refer patients directly to Requestor and perform procedures on such referred patients; or (ii) investors who are not employed by Requestor or by any investor, are not in a position to provide items or services to Requestor or any of its investors, and are not in a position to make or influence referrals directly or indirectly to Requestor or any of its investors.

B. Analysis

The Proposed Arrangement implicates the Federal anti-kickback statute because the Physicians, the Non-Physician Investor, and the Future Physician Investors (if applicable) would hold ownership interests in Requestor and the Physicians (including Physician A up until his retirement) and Future Physician Investors would refer patients to Requestor for services that may be reimbursable by Federal health care programs.

1. Phase 1

a) Financial Distributions

The financial distributions made to the Non-Physician Investor, Physician A, and Physician B and Physician C (if they have opted to purchase shares in Requestor) during the first phase of the Proposed Arrangement would be protected by the single-specialty ambulatory surgical centers safe harbor at 42 C.F.R. § 1001.952(r)(2) because each condition would be met based on Requestor's factual certifications. Specifically, Requestor certified that:

- The terms on which an investment interest is offered to an investor would not be related to the previous or expected volume of referrals, services furnished, or the amount of business otherwise generated from that investor to Requestor.
- At least one-third of each physician investor's medical practice income from all sources for the previous fiscal year or previous 12-month period would be derived from the surgeon's performance of procedures.
- Requestor or any investor (or other individual or entity acting on behalf of the entity or any investor) would not loan funds to or guarantee a loan for an investor if the investor uses any part of such loan to obtain the investment interest.
- The amount of payment to an investor in return for the investment would be directly proportional to the amount of the capital investment (including the fair market value of any pre-operational services rendered) of that investor.
- All ancillary services for Federal health care program beneficiaries performed at Requestor's ambulatory surgical center would be directly and integrally related to primary procedures performed at Requestor, and none would be separately billed to Medicare or other Federal health care programs.
- Requestor and any physician investors would treat patients receiving medical benefits or assistance under any Federal health care program in a nondiscriminatory manner.

Requestor further certified that, during the first phase of the Proposed Arrangement, all of the investors would be: (i) physicians engaged in the same medical practice specialty (i.e., pain management) who are in a position to refer patients directly to Requestor and perform procedures on such referred patients (i.e., Physician A, Physician B, and Physician C); or (ii) investors who are not employed by Requestor or by any investor, are not in a position to provide items or services to Requestor or any of its investors, and are not in a position to make or influence referrals directly or indirectly to Requestor or any of its investors (i.e., the Non-Physician Investor).

b) Ownership Interests

While the financial distributions to the Physicians and the Non-Physician Investor would be protected under the safe harbor, the gifting of the shares to the Non-Physician Investor during the first phase of the Proposed Arrangement would not satisfy a safe harbor. However, we believe the gifting of shares from a husband to his wife—who would not maintain any role in the health care industry—is sufficiently low risk for OIG to issue a favorable advisory opinion. The Non-Physician Investor is not in a position to refer or influence referrals as she has no clinical background. Requestor certified that the Proposed Arrangement is a bona fide estate planning strategy and that it maintains documents (e.g., trust documents, family business plans) to illustrate the long-term succession plan of Physician A and the Non-Physician Investor.

In addition, during the first phase of the Proposed Arrangement, each of Physician B and Physician C would have the option to purchase up to 50 Class A shares at fair market value. While this transfer of ownership interests would not satisfy a safe harbor, Requestor certified that each of Physician B and Physician C would purchase the Class A shares at fair market value as part of a bona fide estate planning strategy. Requestor further certified that it maintains documents (e.g., trust documents, family business plans) to support this assertion. We conclude that the risk of fraud and abuse presented by this aspect of the Proposed Arrangement is sufficiently low under the Federal anti-kickback statute for OIG to issue a favorable advisory opinion.

2. Phase 2

a) Financial Distributions

Financial distributions made during the second phase of the Proposed Arrangement would be protected by the multi-specialty ambulatory surgical centers safe harbor at 42 C.F.R. § 1001.952(r)(3) because each condition of the safe harbor would be met based on Requestor's factual certifications. Specifically, Requestor certified that:

- The terms on which an investment interest is offered to an investor would not be related to the previous or expected volume of referrals, services furnished, or the amount of business otherwise generated from that investor to Requestor.
- At least one-third of each physician investor's medical practice income from all sources for the previous fiscal year or previous 12-month period would be derived from the physician's performance of procedures.

- At least one-third of the procedures performed by each physician investor for the previous fiscal year or previous 12-month period would be performed at Requestor's ambulatory surgical center.
- Requestor or any investor (or other individual or entity acting on behalf of Requestor or any investor) would not loan funds to or guarantee a loan for an investor if the investor uses any part of such loan to obtain the investment interest.
- The amount of payment to an investor in return for the investment would be directly proportional to the amount of the capital investment (including the fair market value of any pre-operational services rendered) of that investor.
- All ancillary services for Federal health care program beneficiaries performed at Requestor's ambulatory surgical center would be directly and integrally related to primary procedures performed at Requestor, and none would be separately billed to Medicare or other Federal health care programs.
- Requestor and any physician investors would treat patients receiving medical benefits or assistance under any Federal health care program in a nondiscriminatory manner.

During the second phase of the Proposed Arrangement, Requestor further certified that all of the investors would be: (i) physicians who are in a position to refer patients directly to the entity and perform procedures on such referred patients (*i.e.*, Physician A (until his retirement), Physician B, Physician C, and Future Physician Investors (if they have purchased shares)); or (ii) investors who are not employed by the entity or by any investor, are not in a position to provide items or services to the entity or any of its investors, and are not in a position to make or influence referrals directly or indirectly to the entity or any of its investors (*i.e.*, the Non-Physician Investor, and, upon retirement, Physician A). Requestor certified that, upon retirement, Physician A would provide a written certification that he would not directly or indirectly influence referrals to Requestor; the written certification is reinforced by Requestor's certification that Physician A does not intend to formally transition or assign his patient panel to Physician B or Physician C. Rather, Physician A plans to gradually transition out of active clinical practice over a number of years. Requestor further certified that Physician A would not maintain an administrative or governance role with Requestor upon retirement.

b) Ownership Interests

During the second phase of the Proposed Arrangement, if the Board votes to issue Class B shares to Future Physician Investors, Requestor would offer up to 100 Class B shares to Future Physician Investors, and Future Physician Investors would purchase such shares at fair market value. While this transfer of ownership interest would not satisfy a safe harbor, Requestor certified that the Future Physician Investors would purchase the Class B shares at fair market value as part of a bona fide estate planning strategy and that Requestor maintains documents (*e.g.*, trust documents, family business plans) to support this assertion. We conclude that the risk of fraud and abuse presented by this aspect of the Proposed Arrangement is sufficiently low under the Federal anti-kickback statute for OIG to issue a favorable advisory opinion.

3. Phase 3

a) *Financial Distributions*

The third phase of the Proposed Arrangement would commence upon the deaths of Physician A and the Non-Physician Investor. Based on Requestor's certifications, the financial distributions made to Physician B and Physician C (and the Future Physician Investors, if they have elected to purchase shares) during this phase of the Proposed Arrangement would satisfy the safe harbor for multi-specialty ASCs.¹⁴

b) *Ownership Interests*

The gift of the ownership interests from Physician A and the Non-Physician Investor to Physician B and Physician C, however, would not satisfy a safe harbor. Nevertheless, we conclude that the gift of the ownership interest from Physician A and the Non-Physician Investor to Physician B and Physician C is sufficiently low risk for OIG to issue a favorable advisory opinion with respect to this phase of the Proposed Arrangement. Requestor certified that the Proposed Arrangement is a bona fide estate planning strategy, and its certification is supported by appropriate documentation (e.g., trust documents, family business plans).

III. CONCLUSION

Based on the relevant facts certified in your request for an advisory opinion and supplemental submissions, we conclude that, although the Proposed Arrangement, if undertaken, would generate—if the requisite intent were present—prohibited remuneration under the Federal anti-kickback statute, OIG would not impose administrative sanctions on Requestor in connection with the Proposed Arrangement under sections 1128A(a)(7) or 1128(b)(7) of the Act, as those sections relate to the commission of acts described in the Federal anti-kickback statute.

IV. LIMITATIONS

The limitations applicable to this opinion include the following:

- This advisory opinion is limited in scope to the Proposed Arrangement and has no applicability to any other arrangements that may have been disclosed or referenced in your request for an advisory opinion or supplemental submissions.
- This advisory opinion is issued only to Requestor. This advisory opinion has no application to, and cannot be relied upon by, any other person.
- This advisory opinion may not be introduced into evidence by a person other than Requestor to prove that the person did not violate the provisions of sections 1128, 1128A, or 1128B of the Act or any other law.

¹⁴ If Requestor has not issued any Class B shares to the Future Physician Investors, the financial distributions to Physician B and Physician C would continue to satisfy the safe harbor for single-specialty ASCs.

- This advisory opinion applies only to the statutory provisions specifically addressed in the analysis above. We express no opinion herein with respect to the application of any other Federal, State, or local statute, rule, regulation, ordinance, or other law that may be applicable to the Proposed Arrangement, including, without limitation, the physician self-referral law, section 1877 of the Act (or that provision's application to the Medicaid program at section 1903(s) of the Act).
- This advisory opinion will not bind or obligate any agency other than the U.S. Department of Health and Human Services.
- We express no opinion herein regarding the liability of any person under the False Claims Act or other legal authorities for any improper billing, claims submission, cost reporting, or related conduct.

This opinion is also subject to any additional limitations set forth at 42 C.F.R. Part 1008.

OIG will not proceed against Requestor with respect to any action that is part of the Proposed Arrangement taken in good-faith reliance upon this advisory opinion, as long as all of the material facts have been fully, completely, and accurately presented, and the Proposed Arrangement in practice comports with the information provided. OIG reserves the right to reconsider the questions and issues raised in this advisory opinion and, where the public interest requires, to rescind, modify, or terminate this opinion. In the event that this advisory opinion is modified or terminated, OIG will not proceed against Requestor with respect to any action that is part of the Proposed Arrangement taken in good-faith reliance upon this advisory opinion, where all of the relevant facts were fully, completely, and accurately presented and where such action was promptly discontinued upon notification of the modification or termination of this advisory opinion. An advisory opinion may be rescinded only if the relevant and material facts have not been fully, completely, and accurately disclosed to OIG.

Sincerely,

/Spencer K. Turnbull/

Spencer K. Turnbull
Acting Assistant Inspector General for Legal
Affairs